United States Court of Appeals

for the Second Circuit

APPENDIX

75-2039

To be argued by
JONATHAN J. SILBERMANN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
ex rel. CLEVELAND HINES,

Petitioner-Appellant,

-against-

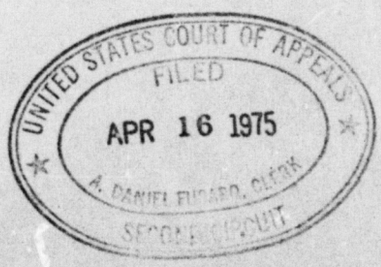
J. E. LaVALLEE, Superintendent
Clinton Correctional Facility,
Dannemora, New York,

Respondent-Appellee.

Docket No. 75-2039

APPENDIX

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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PRO SE

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE CARTER

Jury demand date:

74 CIV. 1891

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
U.S.A. ex rel., CLEVELAND HINES -V- SUPT. CLINTON CORRECTIONAL FACILITY, J.E. LaVALLEE	For plaintiff: Cleveland Hines #47302 Box B Dannemora, N.Y., 12929 For defendant: Louis J. Lefkowitz 2 World Trade Center New York, N.Y., 10047

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	D
J.S. 5 mailed X	Clerk			1FP		
J.S. 6 mailed ✓	Marshal					
Basis of Action: Writ of Habeas Corpus 28 U.S.C. 2254	Docket fee					
	Witness fees					
Action arose at:	Depositions					

PRO SE

JUDGE CARTER

74 CIV. 1891

DATE	PROCEEDINGS	Date Order Judgment N
May1/74	**Filed petition for writ of habeas corpus.**	
May/1/74	**Filed order granting petitionsr to proceed in forma pauperis,Pierce,J.**	
May24,74	Filed Order extending time for respondent to answer to June 18,74,Gurfein,	
Jun.21,74	Filed order extending time for respondent to answer to July 16,74,KnappJ.	
July 8, 1974	Filed order as respondent's time to answer has been extended to July 17, 1974, petitioner's notice for default judgment is, in all respects, denied. Signed by Judge Ward.	
Jul.19,74	Filed order extending time for respondent to answer to August 20,1974, Jude Duffy.	
Aug.28,74	Filed respondent's affidavit in opposition to petitioner's application for a writ of habeas corpus.	
Sep.27,74	Filed affidavit of Traverse of petitioner, Cleveland Hines.	
Sep.27,74	Filed notice of assignment to Carter,J.	
Dec.31-74	**Filed OPINION # 41653---Writ of habeas corpus is denied. So ordered, Carter,J.(to pro se for notices)**	
02-28-75	Filed pltf's petiotion for certificate of probable cause with memo endorsed: Certificate of Probable Cause is hereby issued. - Carter, J.	
03-03-75	Filed plaintiff's notice of appeal to the USCA for the 2nd Circuit from decision and order denying petition for a W/H/C - copies mailed by pro-se clerk.	

in evidence.

THE COURT OFFICER: People's 1 received in evidence. Do you want to see it, Judge?

THE COURT: No. Members of the jury, if at any time there is any inconvenience in shade or temperature of the room, or anything of that nature, don't hesitate to notify us.

Also, if in the course of the trial anyone wishes an adjournment, don't hesitate to notify us either for a recess.

Proceed.

Q Now, lieutenant, where did you take the defendant after placing him under arrest in the Botanical Gardens?

A I didn't hear the first part.

Q Where did you take the defendant after you placed him under arrest at the Botanical Gardens?

A To the 52nd Precinct Stationhouse.

Q What mode of transportationdid you use?

A A marked police vehicle.

Q Now, in route from the Botanical Gardens to the 52nd Precinct, did you have any sort of conversation with the defendant Cleveland Hines?

A Yes; I did.

Q What did you say to him and what did he say to

you?

A. I asked the defendant certain questions such as his name, his address, how old he was, and he answered these questions with his name, Cleveland Hines, and address on 176th Street in the Bronx. He told me he was 33 years of age. I asked him if he was married. He said, "Yes," and I asked him how long he was married and he said 11 years.

I asked him if he had any children. He said yes, he had two children.

Q So he said he had been married for 11 years and had two children; is that correct?

A. Yes.

Q And the man you had that conversation with is the man seated at that table; is that correct?

A. Yes; the defendant.

MR. RAIZNER: Your Honor, I have a police follow up report -- well, I would like it marked for identification purposes at this time.

MXXX MISS HAYMAN: Is that the arrest report?

THE COURT: Mark it for identification.

MR. RAIZNER: That would be People's 2 for identification. It is called a DD-5 judge.

MXXX (DD-5 report marked People's Exhibit 2 for identification.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA ex rel.
CLEVELAND HINES,

Petitioner,

- against -

J. E. LaVALLEE, Superintendent,
Clinton Correctional Facility,
Dannemora, New York,

Respondent.

- x

74 Civ. 1891
Pro Se

#411653

A P P E A R A N C E S:

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Stormville, New York
Petitioner Pro Se

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Attorney for Respondent

CARTER, District Judge

O P I N I O N

This petition for a writ of habeas corpus seeks to set aside the conviction of petitioner Cleveland Hines on three grounds: (1) that petitioner was denied counsel at a pretrial photographic identification in violation of the Sixth Amendment; (2) that the photographic identification was impermissibly suggestive and tainted the subsequent in-court identification of petitioner at trial; and (3) that statements made by petitioner before receiving warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), were improperly admitted into evidence. The petition is denied.

In 1972, petitioner was convicted, inter alia, of sexual abuse, robbery and assault after a trial by jury in the Supreme Court, Bronx County. A notice of appeal was timely filed, and the conviction was affirmed by the Appellate Division, First Department, on December 6, 1973. 43 A.D. 2d 679, 350 N.Y.S. 2d 145 (1st Dept. 1973). On January 16, 1974, leave to appeal to the New York Court of Appeals was denied.

At the trial, the following testimony concerning an attack on Mrs. Patricia Gareri was essentially disputed. At approximately 8:30 on the morning

of July 13, 1972, Mrs. Gareri, a 45-year-old teacher at Fordham Hospital, parked her car in a parking lot in the Bronx Botanical Gardens. As she stepped from her car, a man rushed at her from behind brandishing a knife. After a struggle, Mrs. Gareri was forced to re-enter the car. The attacker asked Mrs. Gareri if she had any money. He took two ten-dollar bills and her wrist watch. (Tr. 113-117)[1] During the course of the attack, Mrs. Gareri was told by her assailant that he had been married for 11 years and had two children (Tr. 120-120A).

Mrs. Gareri testified that her assailant forced her to have sexual intercourse. (Tr. 121). The entire attack lasted approximately 45 minutes. (Tr. 124).

Mrs. Gareri testified at the trial that she studied her assailant's face almost constantly throughout the entire 45-minute attack because she wanted to remember it so that she could identify him later. (Tr. 126).

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[1] The page numbers in parentheses refer to the one-volume state court transcript of the pretrial hearing and trial.

Immediately after the incident, Mrs. Gareri drove to the entrance of the parking lot and described her attacker to the attendant as a black man, about 35 years of age, about five feet, eight inches tall, and weighing approximately 145 pounds, with a goatee and mustache. When the police arrived, she again gave a description of her assailant and related certain information concerning his age and family which he had given to her during the incident. (Tr. 64, 128, 135-6, 152).

On November 13, 1972, a "Wade" hearing [2] was held to determine whether the results of a photographic identification of petitioner by Mrs. Gareri should be suppressed on the ground that the identification procedure was unnecessarily or impermissibly suggestive. At the hearing, Mrs. Gareri testified that on July 14, 1972, the day following the attack, she had examined hundreds of photographs at the precinct stationhouse but had been unable to identify her assailant. (Tr. 29). Mrs. Gareri had informed the police that her attacker had worn a hat. She believed that the men in some of the pictures shown to her on July 14 were wearing hats. (Tr. 32-33).

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[2] United States v. Wade, 388 U.S.218 (1967).

At the hearing, Mrs. Gareri testified that on July 18, the police had informed her that they had arrested a man who met the description she had given. (Tr. 23). At the trial, Mrs. Gareri's testimony indicated that the police had been somewhat more emphatic. She said that when Lt. Mitchell, the arresting officer, told her of the arrest on July 18, he "was positive, he was sure that the man they had was the one that I had described." (Tr. 173-174).

At the pretrial hearing, Mrs. Gareri testified that on July 20, she and her husband met Lt. Mitchell in a police car outside of Fordham Hospital. Lt. Mitchell gave her 14 photographs and asked if she could identify her assailant. (Tr. 14-16). Like petitioner, all of the men in the photographs had facial hair and were either blacks or dark-skinned Puerto Ricans. However, petitioner's photograph was the only picture of a man wearing a hat (Tr. 31-32), and as noted, Mrs. Gareri had informed the police that her attacker had worn a hat.

Mrs. Gareri testified at the hearing that she examined the pictures one by one until she selected petitioner's. (Tr. 19). She did not have to go through

the pictures more than once. (Tr. 19). Nor did she ever select another photograph. (Tr. 35). Mrs. Gareri testified that Lt. Mitchell did not say anything suggestive or otherwise influence her selection of petitioner's photograph. (Tr. 16, 19-20, 35).

Shortly after the Wade hearing began, Mrs. Gareri identified petitioner in open court as her assailant. (Tr. 14). At the conclusion of the hearing, the trial court found that the photographic identification "was not so suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (Tr. 49). Petitioner's motion to suppress was accordingly denied. (Tr. 49).

At the trial, no testimony or any other evidence whatever as to Mrs. Gareri's pretrial photographic identification of petitioner was presented to the jury. However, shortly after the commencement of her testimony at trial, Mrs. Gareri made a positive, in-court identification of petitioner as the man who had attacked her. (Tr. 115).

A pretrial "Huntley" [3] hearing was also held to determine whether certain of petitioner's replies.

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[3] People v. Huntley, 255 N.Y.S. 2d 838; 15 N.Y. 2d 72 (1965).

to the arresting officer's questions should be suppressed because the responses were made before petitioner received his "Miranda" [4] warnings. At the hearing, Lt. Mitchell testified that on July 18, he had arrested petitioner in the Bronx Botanical Gardens on the basis of a description in a police report. (Tr. 51-52). Petitioner was handcuffed and driven to precinct headquarters. Lt. Mitchell testified that in the course of the five-minute drive, he initiated a conversation with petitioner, "just to have something to say." (Tr. 65). Lt. Mitchell asked petitioner, inter alia, whether he was married and whether or not he had children. Petitioner responded that he had been married for 11 years and had two children. [5] Petitioner had not received Miranda warnings at the time Lt. Mitchell elicited these responses. (Tr. 66).

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[4] Miranda v. Arizona, 384 U.S. 436 (1966)

[5] At trial, Lt. Mitchell testified that at 4 p.m. on July 18, approximately three hours after the arrest, Mrs. Gareri informed him by telephone that her assailant had told her that he had been married 11 years and had two children. (Tr. 222, 225).

The trial court found that petitioner's responses constituted "pedigree" statements, and as such, were "outside the perimeter of the 'Miranda' case. ***. " Accordingly, the motion to suppress petitioner's statement was denied. (Tr. 77-78).

A. Right to Counsel at the Photographic Identification

In support of his argument that he had a right to the presence of counsel at the pretrial photographic identification, petitioner cites United States v. Wade, 388 U.S. 218 (1967). In Wade, the Supreme Court held that a pretrial lineup was a "critical stage" of a criminal proceeding, and hence that the accused had a right to counsel at such a lineup.

We acknowledge the force of petitioner's argument that some of the reasons for requiring counsel at a pretrial lineup are equally applicable to a photographic identification. In either case, defense counsel may guard against the use of suggestive or persuasive tactics by the police. In addition, if counsel is able to observe the lineup or photographic identification, he may challenge the procedure more effectively at a pretrial hearing or on cross-examination of witnesses at trial.

We are, however, bound by the Supreme Court's decision in United States v. Ash, 413 U.S. 300, 321 (1973), where it was held categorically that the accused has no Sixth Amendment right to the presence of counsel at a pretrial photographic identification. See United States v. Mojica, 442 F. 2d 920, 921 (2d Cir. 1971); United States v. Fitzpatrick, 437 F. 2d 19, 25-26 (2d Cir. 1970); United States v. Baher, 419 F. 2d 83, 89-90 (2d Cir. 1969); United States v. Bennet, 409 F. 2d 888 (2d Cir. 1969).

In United States v. Bennet, supra, Judge Friendly sought to answer arguments similar to petitioner's by noting that it has never been thought that defense counsel must be present in most circumstances where the prosecution is interrogating its own witnesses. According to traditional standards, it is necessary that defense counsel be present only when the government seeks evidence from the defendant himself:

> " *** [C]ounsel is rather to be provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proferred." [6] 409 F. 2d at 900.

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[6] Because the accused is not entitled to counsel at a photographic identification, the Second Circuit has stated that

(Continued on next page)

B. Suggestiveness of Photographic Identification and Taint of In-Court Identification

Petitioner also claims that the pretrial photographic identification was impermissibly suggestive, and that it irreparably tainted Mrs. Gareri's in-court identification of petitioner at trial. [7]

(Footnote continued from previous page)

the prosecution should hold properly conducted lineups. United States v. Fernandez, 456 F. 2d 638, 641, n.1 (2d Cir. 1972).

The arresting officer in this case testified that the police would have been unable to hold a fair lineup because they could not assemble enough officers of the same description as petitioner. (Tr. 226). Since the record does not indicate that the police were under any time constraint, this excuse is wholly inadequate.

[7] As noted, there is no indication in the record that any testimony or other evidence concerning the photographic identification itself was introduced at trial or that the jury was otherwise aware of the pretrial identification. Thus even if we found that the identification was impermissibly suggestive, we would not need to pass on whether it would be constitutional error to admit testimony as to the photographic identification alone. The ultimate issue before us is whether the pretrial identification irreparably tainted Mrs. Gareri's in-court identification at trial.

The courts in this circuit have never decided whether it would be constitutional error to admit testimony about a pretrial identification that was "unnecessarily suggestive" but did not give rise to a substantial likelihood of an erroneous in-court identification at trial. United States ex rel. Phipps v. Follette, 428 F. 2d 912, 914, n.3 (2d Cir. 1970); but see Clemons v. United States, 408 F. 2d 1230, 1248 (D.C. Cir. 1968), cert. denied, 394 U.S. 964 (1969).

In United States ex rel. Phippa v. Follette, 428 F. 2d 912, 914-15 (2d Cir. 1970), the Second Circuit held that the required inquiry is "two-pronged." The first question is "whether the [pretrial] identification procedure was 'unnecessarily' [Stovall] or 'impermissibly' [Simmons] suggestive." [8] If the pretrial procedure is found to be so suggestive, the court must then determine whether the procedure was so conducive to irreparable misidentification that to allow an in-court identification would be to deny the defendant due process.

Having examined the record of the pretrial Wade hearing, we have determined that the state court made an "adequate" determination of the issue of whether the pretrial identification was impermissibly suggestive. LaVallee v. Delle Rose, 410 U.S. 690, 692 (1973). Therefore, under 28 U.S.C. §2254(d), the state court deter-

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[8] The bracketed references are to Stovall v. Denno, 388 U.S. 293, 301-02 (1967) and Simmons v. United States, 390 U.S. 377,384 (1968), in which the Supreme Court established the indicated standards for pretrial identification.

mination on this issue [9] is presumed to be correct, and petitioner bears the burden of establishing by "convincing evidence that the state courts' [sic] determination was erroneous." Id. at 695.

By contrast, the trial court apparently made no determination on the second issue stated in Phipps, that is, whether the pretrial identification tainted the subsequent in-court identification. [10] Thus with respect

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[9] Despite the statement in Townsend v. Sain, 372 U.S.293,309 n.6 (1963), that the presumption of correctness applies only with respect to "basic, primary and historical facts," the Supreme Court's decision in LaVallee v. Delle Rose, 410 U.S. 690 (1973) indicates that, at least for purposes of 28 U.S.C. §2254(d), the presumption operates also with respect to "mixed questions" and ultimate facts such as the issue of the suggestiveness of a pretrial identification. LaVallee v. Delle Rose itself concerned the voluntariness of a confession which is a mixed question or ultimate fact.

The limitation of the presumption to "historical fact" issues may continue to apply where the question is whether the District Court is to hold an evidentiary hearing.

[10] Having concluded that the pretrial identification was not impermissibly suggestive, the state court apparently saw no reason to proceed with the issue of whether the pretrial procedure tainted the in-court identification at trial.

We are more certain of our conclusion on the second issue than the first, however, and choose to rest our denial of the writ on our decisions on both issues.

to the second issue, the state bears the burden of showing by a preponderance of the evidence that the pretrial procedure did not taint the subsequent in-court identification.

With respect to the first question, the use of the photographic identification itself was "unnecessary" since the police were subject to no time constraint, and could have assembled a lineup. See Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). However, the Supreme Court in Neil v. Biggers, 409 U.S. 188, 198-99, 93 S. Ct. 375-391 (1972), held that the fact that the procedure used was unnecessarily suggestive does not alone require that the results thereof be excluded; the primary concern is with the accuracy of the procedure.

In determining whether pretrial identification procedures were "impermissibly" suggestive, the Supreme Court and the Second Circuit have considered factual circumstances similar to those in the instant case. In Simmons v. United States, supra, where it was held that the procedure was not impermissibly suggestive, the Supreme Court emphasized that prior to the identification, the police told the witness nothing about the progress of the investigation. 390 U.S. at 385, 88 S. Ct. at 971. By contrast, in the present case, Mrs. Gareri was told that the police were certain that they had

arrested the man that she had described. Thus she had every reason to expect that a picture of her assailant would be found among the 14 photographs displayed to her.

In United States v. Evans, 484 F. 2d 1178, 1185 (2d Cir. 1973), the court stressed that there must be "no distinctive characteristics about [the defendant's] photograph as compared to those of the others." In this case, Mrs. Gareri had informed the police that her assailant had worn a hat; and petitioner's photograph was the only one out of the 14 photographs which showed a man wearing a hat. In United States v. Fernandez, 456 F. 2d 638, 641 (2d Cir. 1972), where a bank robber was described as a black man with an Afro haircut and light skin and where defendant's photograph was the only one of six showing a man with these characteristics, the court held that this fact alone would make the array impermissibly suggestive. We recognize that the presence or absence of a hat in the instant case is not as significant a characteristic as hair style or skin color. However, we disagree with the state that it was "so superficial" a characteristic that it "clearly" would not influence a witness's choice. [11]

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[11] The fact that Mrs. Gareri was earlier shown pictures of hundreds of men, some of whom wore hats, may mitigate the suggestive effect of the presence of petitioner's hat in his picture in the spread of 14 photographs.

Counterbalancing the suggestive circumstances of the photographic procedure is the fact that the attack took place out-of-doors in the morning and that Mrs. Gareri was able to study the assailant's face for nearly 45 minutes. United States v. Evans, 484 F. 2d 1178, 1183 (2d Cir. 1973). In addition, the 14 photographs were shown to Mrs. Gareri only a week after the attack while her memory was presumably still relatively fresh.

It would appear that petitioner has failed to show by "convincing evidence" that the trial judge erred in his conclusion that the pretrial identification was not impermissibly suggestive. However, even if we were to rule otherwise on the first issue, we would be compelled to hold against petitioner on the second. For the state has shown by a preponderance that the pretrial procedure did not taint the subsequent in-court identification. That is to say, even if the pretrial photographic identification procedure was impermissibly suggestive, there is virtually no doubt that Mrs. Gareri's in-court identification of petitioner at trial was based on a reliable, independent recollection, rather than on the photograph of petitioner. In Phipps, the court acknowledged that although after an unlawful pretrial identification, "the image of the person identified will

remain in [the witness's] mind to some degree," the witness should not necessarily be prevented from making an in-court identification. The court must determine whether the witness had a sufficiently definite image in his or her mind before the pretrial identification:

> "The effort must be to determine whether before the imprint arising from the unlawful identification procedure, there was already such a definite image in the witness' mind that he is able to rely on it at trial without much, if any, assistance from its successor." 428 F. 2d at 915.

The factors to be considered in determining whether Mrs. Gareri had such a definite image of her attacker include her "initial opportunity for observation"; her motivation to observe; the certainty of her identification; the lapse of time between the crime and the pretrial identification and the interval between the pretrial confrontation and the trial; and the accuracy of her description to the police. United States ex rel. Phipps v. Follette, 428 F. 2d 912, 915; Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 382 (1972).

In the present case, Mrs. Gareri had the opportunity to observe her attacker at close range for nearly 45 minutes in daylight. (Tr. 113-32).

She was motivated to observe her attacker carefully "to seek out and retain [the] image" of his face, since she was the victim, not merely an observer, of the crime. United States ex rel. Phipps v. Follette, supra, at 915; Neil v. Biggers, supra, 409 U.S. at 200, 93 S. Ct. at 382-83. Indeed, she testified that she studied his face because "I wanted to make sure to remember it so I could identify him at a future date." (Tr. 126).

At the trial, Mrs. Gareri's identification of petitioner as her assailant was certain:

> "Q. I want you to take another look at him, Mrs. Gareri. Are you sure that is the man who raped and robbed you?
>
> "A. I'll never forget that face. Of course, I'm sure." (Tr. 131).

The interval between the attack and the photographic identification was only a week.

The Court of Appeals has also warned that a long lapse between the crime and the trial coupled with a comparatively short interval between an improper pretrial identification and the trial may increase the likelihood that the witness will rely on the improper pretrial identification in identifying the defendant at trial. 428 F. 2d at 915. In this case, since the

photographic identification occurred only a week after the crime, the lapse between the identification and the trial was obviously only a week less than the four-month interval between the crime and the trial.

Finally, Mrs. Gareri gave a detailed description of her attacker to the police. (Tr. 153, 171).

In summary, we find that "there was already such a definite image [of her assailant] in the witness' mind" that Mrs. Gareri's in-court identification of petitioner was reliable, whether or not the pretrial procedure was "unnecessarily" or "impermissibly" suggestive.

C. Admission into Evidence of Statements Made Prior to "Miranda" Warnings

Petitioner's final claim is that his statement to Lt. Mitchell that he had been married 11 years and had two children should not have been admitted into evidence since it was made before petitioner received Miranda warnings. Petitioner's statement corroborated Mrs. Gareri's testimony since she testified that her assailant had given her the same information during the attack.

The trial court correctly characterized petitioner's responses as "pedigree" statements whose subject matter was not within petitioner's exclusive knowledge.

There is, however, a conflict of authority as to whether Miranda requires the exclusive of such statements from evidence. In Proctor v. United States, 404 F. 2d. 819 (D. C. Cir. 1969) the defendant was given Miranda warnings, but after he stated that he did not wish to be questioned further, a police officer asked him whether he was emplyed and thereby elicited a statement which was used to impeach him at trial. The D. C. Circuit held that the statement should have been excluded even though it was general personal information and the officer did not intend to elicit a statement, damaging or otherwise, bearingon the crime.

By contrast, in Farley v. United States, 381 F. 2d 357, 359 (5th Cir. 1967), the Fifth Circuit held that a defendant's statement of where he lived, which was obtained in violation of Miranda, should not be excluded since the defendant's residence was not within his exclusive knowledge. The New York Court of Appeals has followed Farley on the ground that "this is not the type of information intended to be covered by Miranda." People v. Rivera, 26 N.Y. 2d 304, 310, 310 N.Y.S. 2d 287, 291 (1970); People v. Ryff, 27 N.Y. 2d 707, 314 N.Y.S. 2d 17 (1970).

In the absence of any authority in the Second Circuit on this issue, we have decided to follow the Fifth Circuit and to hold that it was not constitutional error to admit evidence of petitioner's statement. As noted by the state, if the evidence as to petitioner's marriage and children had not been elicited by Lt. Mitchell, such general information could easily have been obtained from some other source. [12]

For the reasons set forth above, the writ of habeas corpus is denied.

SO ORDERED.

Dated: New York, New York
December 26, 1974

Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

[12] The state also notes that Lt. Mitchell testified that in asking about petitioner's family, he did not intend to elicit incriminating statements from petitioner. We need not decide whether, as the state appears to contend, it would not be inconsistent with the deterrent purpose of the Miranda rule to admit all incriminating statements which a police officer unintentionally elicits prior to the required warnings. As noted supra, Proctor v. United States, 404 F. 2d 819 (D.C. Cir. 1969) holds to the contrary.